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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DIAMOND RESORTS WAGE AND HOUR CASES,

E071769

(Super.Ct.Nos. JCCP4923 & RIC1510389)

OPINION

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge. Affirmed.

Lawyers for Justice, Edwin Aiwazian, Arby Aiwazian, and Joanna Ghosh, for Plaintiffs, Intervenors and Appellants, Autumn Smith, Alice Alvarez and Juanita Smith.

Snell & Wilmer, Todd E. Lundell, Brian J. Mills, and Anne Dwyer, for Defendants and Respondents, Diamond Resorts International Marketing, Inc., Diamond Resorts Management, Inc., and Diamond Resorts International, Inc.

Gupta Wessler, Deepak Gupta, and Alexandria Twinem, for Respondents, Ward A. Johnson, Gary Coker, Lisa Evans, and Maria Lourdes Sarabia.

James Hawkins, James R. Hawkins, and Gregory Mauro, for Respondents, Ward A. Johnson, Gary Coker, and Lisa Evans.

Law Offices of Sahag Majarian II and Sahag Majarian; Kingsley and Kingsley, Eric Kingsley, and Ariel J. Stiller-Shulman, for Respondent Maria Lourdes Sarabia.

In 2018, Ward Johnson and his former employer, Diamond Resorts,[1] agreed to settle a wage and hour class action lawsuit for $2.8 million. Johnson represented a class of over 3,000 Diamond Resorts employees. The settlement results in an average individual payment of over $500 to participating class members. The highest individual award is $4,000. Notified of the settlement, less than 0.5% of the class opted out, and only nine would-be class members objected.

This appeal involves some of those objectors, Autumn Smith, Alice Alvarez, and Juanita Smith, all of them named plaintiffs in a separate wage and hour class action lawsuit against Diamond Resorts entities. They argue the claims of the class were worth tens of millions of dollars more than the settlement amount and argued at settlement fairness hearings in the trial court that Johnson's counsel didn't adequately research or

[1] The respondents in this appeal are Diamond Resorts International Marketing, Inc., Diamond Resorts International, Inc., and Diamond Resorts Management, Inc. We refer to them collectively as Diamond Resorts, though context sometimes requires us to distinguish among them because different corporate entities were named as defendants in different class actions and at different times during this case.

value the claims they sought to settle. The trial court approved the settlement between Johnson and Diamond Resorts despite these objections, and the objectors now appeal that decision.

They argue the trial court abused its discretion by approving the settlement despite the deficiencies in investigation and valuation. They also argue the trial court erred by (i) allowing Johnson to settle claims dating back to August 2011, beyond the statute of limitations for any of the named plaintiffs in his lawsuit, (ii) entering judgment without ensuring proper notice to the class, (iii) approving a settlement class that is too broad, and (iv) failing to issue specific findings when objectors requested that it do so.

We conclude the trial court acted within its discretion when it concluded the settlement was a fair and reasonable resolution of the class claims and the other objections have no merit. We therefore affirm the trial court's order approving the settlement and affirm the judgment.

I

FACTS

A. *Johnson's Class Action*

Diamond Resorts sells memberships in timeshare vacation properties in California. Johnson worked for Diamond Resorts from February 2013 to December 2015. Johnson's job involved driving to and from timeshare selling events, setting up and breaking down advertising materials at those events, and working at sales booths selling memberships.

According to Johnson, Diamond Resorts failed to pay required wages (including overtime wages) and failed to pay the wages they did pay in a timely fashion. He said they also failed to provide required meal periods, rest periods, and reimbursements for work-related expenses. He said Diamond Resorts regularly required employees to punch out for lunch but continue working, forego rest breaks, and make business calls using their personal cell phones for business purposes. He also alleged they failed to pay overtime rates for days when employees worked a seventh consecutive day and failed to pay employees their earned wages when they were terminated or within 72 hours after employees left voluntarily.

In January 2017, Johnson made these allegations against Diamond Resorts International Marketing, Inc. and Does 1 through 50 in a wage and hour class action complaint in Orange County Superior Court. Johnson alleged assorted Labor Code violations, including that Diamond Resorts International Marketing, Inc. failed to pay wages and overtime wages, failed to provide meal periods, failed to provide rest periods, failed to pay wages on time, and failed to reimburse business expenses. He also brought a claim for unfair competition.

Johnson brought the suit for himself and for the class of "all persons who are or were employed in non-exempt positions, however titled, by [Diamond Resorts] in the state of California within four (4) years prior to the filing of the complaint in this action until resolution of this lawsuit." He sought to represent a subclass of those class members

employed "at any time between January 2014 and the present [who] have separated their employment."

In May 2017, Diamond Resorts responded to Johnson's formal discovery requests, including interrogatories and requests for production of documents, and the parties met several times from April to August 2017. Before the parties went to mediation, Johnson received his own time and payroll records and a one-third sample of time and payroll records for other employees who were members of the putative class. Diamond Resorts also provided their employee handbook, job descriptions for non-exempt employees, operating procedure manuals, bonus and commission structures, and written policies on timekeeping, pay schemes, and meal and rest periods. They also provided pay stubs and data on the number of workweeks and average pay rates. Johnson hired a consultant and used this information to analyze Diamond Resort's potential liability to the class.

B. *The Smith Class Action*

Appellant Autumn Smith had filed a similar wage and hour class action against Diamond Resorts entities in Riverside County Superior Court on August 28, 2015. She brought the case on behalf of all non-exempt employees of Diamond Resorts Management, Inc., Diamond Resorts International, and unknown related entities who worked for them in California from August 28, 2011 to final judgment.

Over the next year, Smith amended her complaint twice. In October 2015, she added Alice Alvarez as a named plaintiff and added as a purported subclass, employees who earned commissions, non-discretionary bonuses, and non-discretionary performance

pay. Smith alleged these were forms of compensation Diamond Resorts improperly ignored in calculating overtime wages. In July 2016, they amended the class complaint again to add Juanita Smith as a named plaintiff. And in September 2016, they added Diamond Resorts International Marketing, Inc. as a named defendant. We will refer to this case as the "Smith Class Action," the three named plaintiffs as the "Smith Plaintiffs" and the two defendants named in the case as the "Smith Defendants."

The Smith Plaintiffs alleged violations of the California Labor Code for: (1) unpaid overtime, (2) unpaid meal period premiums, (3) unpaid rest period premiums, (4) unpaid minimum wages, (5) untimely payment of final wages, (6) untimely payment of regular wages during employment, (7) non-complaint wage statements, (8) inadequate payroll records, and (9) unreimbursed business expenses. They also alleged claims for unfair competition under California Business and Professions Code section 17200 et seq. and sought recovery of penalties and remedies under California's Private Attorneys General Act of 2004, Labor Code section 2698 et seq. (PAGA). These are the same sorts of violations Johnson alleged, but Johnson's original complaint did not include causes of action for the failures to pay regular wages in a timely fashion, to pay minimum wages, to provide adequate wage statements, or to keep required payroll records, nor did it seek penalties and remedies under PAGA.

The parties to the Smith Class Action engaged in substantial litigation over the next two years. In December 2015, the Smith Defendants removed the class action to federal court. The next month, the Smith Plaintiffs succeeded in getting the federal court

to remand the lawsuit to state court. The parties then engaged in motion practice and discovery, including two depositions. In late 2016, the Smith Plaintiffs and the Smith Defendants made an informal exchange of documents and data to prepare for mediation. They then attended mediation sessions with an experienced mediator in March and May of 2017, but didn't reach a settlement.

Meanwhile, Diamond Resorts gave Johnson all the discovery documents and data the Smith Defendants had provided to the Smith Plaintiffs, including information dating back to August 2011, the beginning of the class period in the Smith Class Action. Diamond Resorts withheld only the Smith Plaintiffs' personnel files.

C. *Coordination and Consolidation of the Johnson and Smith Class Actions*

Johnson filed a petition for coordination of the Johnson and Smith Class Actions. In June 2017, the trial court held a hearing and determined coordination of the two cases was appropriate. The court granted the petition and assigned both cases to a coordinating judge in Riverside County Superior Court under the title "Diamond Resorts Wage and Hour Cases."

Maria Lourdes Sarabia filed a third class action against Diamond Resorts Management, Inc. in August 2017. Sarabia's complaint alleged wage and hour violations similar to Johnson's complaint. She alleged claims for failure to pay wages, including overtime; failure to pay vested vacation time on separation of employment; failure to provide compliant wage statements; and sought waiting time penalties under Labor Code section 203. She also alleged an unfair competition violation.

After the parties in the Johnson class action reached settlement, Sarabia amended her complaint to add a cause of action seeking penalties under PAGA. Diamond Resorts filed a notice of related case with the trial court on September 20, 2017. In the end, Sarabia joined the Johnson class action as a named plaintiff.

D. *Mediation and Settlement*

Johnson and Diamond Resorts went to mediation on August 23, 2017 with the assistance of an experienced employment law class action mediator. Johnson and his attorneys were aware of the claims against Diamond Resorts brought in the other two class actions and had received nearly all the documents and data supplied to the plaintiffs in those cases. However, neither the Smith Plaintiffs nor their attorneys participated in the mediation.

The parties did not reach an agreement at the mediation, but the mediator proposed settlement terms, which the parties took under advisement. On September 1, 2017, the parties agreed to adopt the mediator's proposed settlement. On October 23, 2017, Johnson and Diamond Resorts filed a joint notice of settlement, which purported to resolve the claims of all three class actions.

At the time Johnson and Diamond Resorts reached their settlement, only the Smith Plaintiffs had brought claims against the Diamond Resorts International and Diamond Resorts Management entities. In addition, Johnson hadn't brought claims for failure to keep required pay records, failure to provide compliant wage statements, or failure to pay minimum wages, nor had Johnson asked for PAGA penalties.

As part of the settlement, the parties stipulated to an amended complaint to bring all the claims against Diamond Resorts to a close. The new complaint included claims for failure to pay wages (including overtime wages), failure to provide meal periods, failure to provide rest periods, failure to pay wages in a timely fashion, failure to furnish accurate itemized wage statements, failure to keep required payroll records, and failure to reimburse for business expenses, and also included an unfair competition claim and sought penalties under PAGA. The new complaint did not include claims that Diamond Resorts had failed to pay its employees minimum wage as the Smith Plaintiffs had alleged, though that claim overlaps factually with the claim that Diamond Resorts forced employees to work off the books.

The new complaint filed in January 2018 sought relief for the same class alleged in Johnson's original complaint. Under that definition, the class period began "four years prior to the filing of the complaint in this action" rather than August 2015, when the Smith Class Action was filed. The new complaint added a new subclass: "All class members who have been employed by [Diamond Resorts] in non-exempt positions within the state of California at any time between September 2013 and the present and have separated their employment." The amended complaint added Maria Lourdes Sarabia, Gary Coker, and Lisa Evans as named plaintiffs and Diamond Resorts International, Inc. and Diamond Resorts Management, Inc. as named defendants.

The settlement proposal called for a total common fund of $2.8 million, from which Diamond Resorts would make individual settlement payments as well as pay reasonable attorney fees and costs, class representative payments, settlement administration costs, PAGA penalties, and all taxes due on the wages portion of the settlement payments.

Class members were to be covered by the settlement unless they submitted a form opting out. A settlement administrator was to calculate each class member's payment using a complex formula. The parties estimated members would recover between $12.14 and $3,836.00, with the average recovery being $550. The low end payment would go to any class member who worked only one week during the class period before resigning or being terminated.

The settlement provided, subject to court approval, that $130,000 of the settlement would be allocated to PAGA penalties, $19,000 would pay settlement administrative costs, named plaintiffs would receive additional payments of $7,500 each, and class counsel would receive $933,333.33 in fees and up to $25,000 to pay actual costs. The settlement specified three quarters of the $130,000 in PAGA penalties would be paid to the Labor Workforce Development Agency and one quarter of those penalties would be paid to employees.

The settlement also included safety valves for the parties. Diamond Resorts had the option to terminate the settlement if more than 10 percent of the class opted out. The plaintiffs retained the right to terminate the settlement if the total number of weeks

worked by class members exceeded the estimate of 137,000 by 5 percent. The settlement agreement also included procedures for providing class members with notice, allowing them to opt out of the settlement, and allowing them to object.

E. *Preliminary Approval of the Settlement*

In March 2018, Johnson submitted the settlement to the trial court and moved for preliminary approval.

In support, they provided declarations and a memorandum explaining how they had valued the claims. Johnson's counsel explained they had determined the failure to pay overtime claim was worth $1,302,546 based on discovery materials showing there were approximately 3,023 class members who worked approximately 137,000 workweeks during the class period, earning an average hourly wage of $11.88 and an average overtime hourly rate of $17.82. Johnson's counsel estimated employees worked on average a half-hour of unpaid overtime each shift, making the maximum claim equal to the overtime rate ($17.48) times one-half of the 148,000 shifts. The parties also pointed out obstacles to proving the plaintiffs should recover the full amount of the class claims. Diamond Resorts argued it had produced timesheets which are presumed accurate, and that plaintiffs would have to show the timesheets were inaccurate and also show the employer knew its employees were working off the clock.

They provided similar breakdowns for each claim. Overall, Johnson estimated $11,679,614 was realistically recoverable. However, Johnson's counsel also emphasized the difficulty of litigating a class action with over 3,000 class members. They specifically

identified Diamond Resorts' arguments against class certification for such a large class with so many different claims. Based on the uncertainties of proof and certification, the parties asserted $2.8 million was a fair and reasonable settlement.

In April 2018, the Smith Plaintiffs moved to intervene in the Johnson case to oppose the settlement. They lodged a proposed complaint-in-intervention with their motion, which set out their reasons for opposing approval of the settlement.

The Smith Plaintiffs argued the proposed settlement didn't represent a fair, reasonable, or adequate resolution of the claims in their class action. They also argued that the settlement constituted an improper reverse auction. They argued their intervention was necessary to make sure the coordinated cases were litigated in the best interests of the class.

At a hearing on April 26, 2018, the court allowed the intervention and identified certain problems with the settlement documents. The court asked the parties to make the following changes. First, amend the class definition to explicitly include the entire class period back to August 2011. Second, provide support showing class counsel had researched the potential claims for class members who worked for Diamond Resorts all the way back to August 2011, even though none of the named plaintiffs in the Johnson case worked for the defendants that early. Third, add to the class notice a disclosure that anyone who stayed in the Johnson class couldn't participate in the Smith Class Action.

Counsel for the Johnson class and Diamond Resorts tried to comply with these requirements by filing a supplemental declaration and joint stipulation. In the declaration, class counsel represented they had received documents and data provided to the Smith Plaintiffs which stretched back to August 2011. That information included "employee handbooks and relevant wage and hour policies on timekeeping, pay schemes, meal and rest periods, vacation policies, job descriptions and job duties." They said their analysis of the value of the claims took that information into account. They said they had "reviewed and analyzed time and payroll records consisting of a 1/3 sample of Class Members' time and payroll records which were inclusive of records for employees working in 2011 and continuing through the Class Period." They also said they had "reviewed and analyzed the compensation information relating to the Class Members dating back from 2011 through the Class Period such as . . . workweeks, average pay rates, bonus and commission structures, and other relevant information relating to the claims asserted in the complaints all during the Class Period of August 2011 through the Class Period."

The joint stipulation amended the complaint to define the class as "all persons who are or were employed in non-exempt positions, however titled, by Defendants in the state of California from August 28, 2011 until resolution of this lawsuit" and the subclass Johnson represented as "[a]ll class members who have been employed by Defendant in non-exempt positions within the state of California at any time between August 28, 2012 and the present and have separated their employment."

The plaintiffs in the Smith Class Action opposed preliminary approval. They valued the claims against Diamond Resorts at $45 million, which included more than $20 million in nine PAGA penalties and almost $8 million in interest on the overtime and break claims. They said the initial data Diamond Resorts had provided them "omitted pieces of information for a sizable portion of the putative class members" and they received "[s]ome additional information" from them as well as "through other sources, to allow for extrapolation." They said they didn't know whether Johnson's counsel obtained the additional information as well.

At a June 2018 hearing on preliminary approval, the trial court requested several additional changes to the settlement documents, including a disclosure of the net settlement amount and adding to the disclosure of the highest and average expected payments the lowest expected payment. The court told class counsel it likely would award lower bonuses for named plaintiffs, since they hadn't been required to sit for depositions, and lower attorney fees, since the court would deduct from the settlement amount the employers' share of payroll taxes.

The parties amended the settlement agreement and class notice to comply with the court's requests. On July 2, 2018, the trial court granted preliminary approval of the settlement. The court wrote, "[i]t further appears that sufficient investigation, research, and litigation has been conducted such that counsel for the Parties at this time are able to reasonably evaluate their respective positions."

F. *Notice, Opt Outs, and Objections*

The settlement administrator mailed class notice to 3,205 class members on August 1, 2018. The notice included instructions on how to participate in, opt out of, or object to the settlement.

Few class members stated objections. Only 11 class members submitted requests to opt out of the settlement. Nine class members, three of them named plaintiffs in the Smith Class Action, filed objections to the settlement. The Smith Plaintiffs reiterated the objections they stated at the preliminary approval stage.

G. *Motion for Final Approval of the Settlement*

After the objection period had passed, Johnson moved for final approval of the settlement. The Smith Plaintiffs filed objections and opposed final approval.

Johnson's counsel submitted a declaration supporting the value of the settlement. He calculated Diamond Resorts' likely liability as $11,679,614 and its maximum exposure as $20 million. The declaration included a detailed explanation of how they calculated Diamond Resorts' exposure for each kind of claim.

Class counsel estimated Diamond Resorts' exposure for overtime claims based on the timekeeping and payroll records for the approximately 1,000 employee sample. They estimated each class member worked a half-hour of overtime per shift. At an average overtime hourly rate of $17.48 for approximately 148,000 shifts, they concluded the class had been underpaid by $1,302,546.

They estimated exposure for missed meal break claims at $1,736,728. Their consultant estimated 24 percent of all meal breaks were either short or late. That would have resulted in a higher recovery, but class counsel concluded Diamond Resorts' realistic exposure would be lower because they had written policies and training on meal breaks that correctly stated California law. They also discounted the recovery for this claim because Diamond Resorts indicated they would contend employees had discretion over their schedules and often voluntarily waived their meal breaks, factors which posed potential problems for class certification and for proof of the meal break claims.

They estimated exposure for rest period claims at $3,614,483. They reached this figure based on there being 1,949 commissioned employees who worked about 68,534 workweeks during the class period. They noted rest period claims are difficult to prove because there are no records and certain California legal precedent could make full recovery difficult.

They estimated exposure for unreimbursed expense claims as $384,927.50. They limited these claims to the 1,692 class members whose job descriptions made it likely they would use their personal phones for work. They estimated 5 percent of such employees' total phone use was work related and assumed an average monthly phone bill of $50 over the 79 months in the class period. They noted potential difficulties with these claims, including that Diamond Resorts allowed employees to claim reimbursements for phone use and their claim that they had in fact reimbursed some employees.

They valued claims that Diamond Resorts made late wage payments after separation under Labor Code sections 201 and 202 and for penalties under Labor Code section 203 at $1,848,009 because Diamond Resorts would have a colorable defense that they did not act willfully.

Finally, Johnson's counsel valued PAGA derivative claims at $1,074,200. They explained they placed this estimate on the low side because the claims were duplicative of their other claims and such awards are in the discretion of the court and some courts have awarded only nominal awards. For each of these, they identified difficulties of proof or overcoming legal precedent.

Johnson's counsel also estimated some claims had no value. They explained claims that Diamond Resorts kept inadequate time records under Labor Code section 1174 were not valuable because the statute doesn't create a private right of action and the data Diamond Resorts had produced would make it difficult to prove they didn't keep accurate time records. They valued the unpaid vacation time claim at zero because Diamond Resorts had a recorded practice of paying vested vacation with an employee's last paycheck, and because there was little evidence to support the claim. They valued the unfair competition claims under Business and Professional Code section 17200 at zero as duplicative of the Labor Code violations and the PAGA civil penalties.

The total settlement amount represented 24 percent of Diamond Resorts' realistic exposure estimate. Johnson's counsel argued the amount was fair and reasonable because of the great number of legal and factual defenses Diamond Resorts would put forward in

litigation as well as potential difficulties obtaining class certification. He said going to trial would be "an expensive, complex and time-consuming process" that would require the class to "establish a significant amount of witness testimony, pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other evidence in order to evaluate and present arguments at both class certification and trial." Litigating the case would likely occupy several years and pose a significant risk of failure.

H. *Final Approval of the Settlement*

The trial court held a fairness hearing on October 25, 2018. The court began the hearing with its tentative ruling. "I'm inclined to grant final approval of the settlement. [¶] With respect to the fees and costs and class representative enhancements, fees approved in the amount of $898,710. Costs of $16,000 . . . . And as far as the class representative enhancements, I'll approve enhancement for Mr. Johnson in the amount of $2500, and the other class reps in the amount of $1500. [¶] The reason why I reduced the fees is I deducted the amount of employer's share of payroll taxes that are coming out of the 2.8 [million] and then took 33 percent of the reduced amount." "As far as the opposition, the Court has read it and considered it and nonetheless is going to grant final approval."

The trial court found notice sufficient, noting over the objections to its description of the claims that the notice contained "directions to the Court if they want to read the settlement, the telephone numbers of all counsel, including the objecting attorney's

telephone number," and held it was "more than ample for them to get their questions answered if the notice left them uncertain."

The Smith Plaintiffs argued the settlement required closer scrutiny to ensure class counsel had adequately investigated the claims and argued the settlement was in effect a collusive reverse auction. Johnson's counsel pointed out it had obtained substantial amounts of discovery, including the discovery provided the objectors, and provided a detailed analysis of the claims' values. Diamond Resorts' counsel pointed out that the settlement had been proposed by a neutral, experienced mediator. The trial court concluded the settlement was fair and reasonable without elaborating further.

The objectors' counsel then asked the trial court to "make formal findings, a formal Statement of Decision stating the factual and legal basis for ten separate points listed at the end of our opposition to the motion for final approval." The trial court asked whether they had submitted case law suggesting an objector was entitled to a written statement of decision. Counsel responded they had not, and the court denied the request.

On October 31, 2018, the court issued an amended order granting final approval of the settlement. The court concluded the settlement terms were "fair, reasonable and adequate in all respects," and that the settlement "was made in good faith and in the best interests of the Parties."

The trial court entered judgment on November 7, 2018, and the Smith Plaintiffs filed a timely notice of appeal.

II

ANALYSIS

The Smith Plaintiffs argue the trial court erred by approving the class action settlement. They say the settlement itself was the product of inadequate investigation leading to an undervaluation of the class claims. They say the trial court approved the settlement without sufficient information to determine the reasonableness of the agreement and failed to independently and objectively evaluate the settlement or address their objections. They also object that the trial court shouldn't have approved the settlement because none of the named plaintiffs had live claims for the early part of the class period, the notice to class members was inadequate, and the release was too broad. Finally, they object that the trial court erred by failing to produce a written statement of decision when asked.

A. *The Trial Court's Fairness Determination*

Courts must approve the settlement or dismissal of class action lawsuits "to prevent fraud, collusion or unfairness to the class." (*Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-579.) The court must determine the settlement is fair, adequate, and reasonable. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 (*Dunk*).) "The purpose of the requirement is 'the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties.'" (*Ibid.*)

When evaluating the reasonableness of a class action settlement, the trial court should consider "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." (*Dunk*, *supra*, 48 Cal.App.4th at 1801.) This list of factors "is not exhaustive and should be tailored to each case." (*Ibid*.)

Though the burden is on the proponents of the settlement, "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

There are two steps to approving a class action settlement in California. (Cal. Rules of Court, rule 3.769; see also Code Civ. Proc., § 581, subd. (k).) "First, the court preliminarily approves the settlement and the class members are notified as directed by the court. [Citation.] 'The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.' [Citation.] Second, the court conducts a final approval hearing to inquire into the fairness of the proposed settlement. [Citation.] If the court approves the settlement, a

judgment is entered with provision for continued jurisdiction for the enforcement of the judgment." (*Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118.)

Our review of the trial court's approval of the class action settlement is limited. We don't "make an independent determination whether the terms of the settlement are fair, adequate and reasonable" but instead determine '"only whether the trial court acted within its discretion.'" (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128 (*Kullar*).) We accord great weight to the trial court's views because "'so many imponderables enter into the evaluation of a settlement.'" (*Ibid.*)

We therefore review a trial court order approving a class action settlement for abuse of discretion. (*Cellphone Termination Fee Cases*, *supra*, 180 Cal.App.4th at p. 1118.) "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711, fns. omitted.)

The Smith Plaintiffs don't realistically dispute that class counsel is experienced in class action litigation. They submitted long lists of similar lawsuits they've led. Nor do they realistically dispute that the percentage of opt-outs and objectors is small (nine and 11 out of more than 3,000). (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1152-1153 [nine objections and 80 opt-outs not significant compared to class of 5,454].) But they argue the settlement wasn't reached through

arm's-length bargaining and there was insufficient investigation and discovery to allow counsel or the court to act intelligently. We consider those factors in turn.

1. *Reverse auction*

The Smith Plaintiffs argue the settlement resulted from a reverse auction, not arm's-length negotiation.

A reverse auction occurs where "the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the [trial court] will approve a weak settlement that will preclude other claims against the defendant." (*Duran v. Obesity Research Institute, LLC* (2016) 1 Cal.App.5th 635, 642, fn. 4.) A reverse auction requires evidence of collusion. (*Negrete v. Allianz Life Ins. Co. of N.Am.* (9th Cir. 2008) 523 F.3d 1091, 1099 [a reverse auction "has an odor of mendacity about it"].)

There is no such evidence in this case. The Smith Plaintiffs point to the fact that they filed their class action first and engaged in significant motions practice before the Johnson Plaintiffs filed their own class action. They also point to the fact that the Johnson Plaintiffs reached their settlement in mediation only months after the Smith Plaintiffs had engaged in two rounds of mediation without reaching a settlement. Finally, they point out the Johnson Plaintiffs valued at zero some claims that had been part of the Smith Class Action alone before settlement negotiations.

Though these facts are uncontested, they do not on their own support an inference of collusion. They are consistent with the Smith Plaintiffs' expressed view that Diamond Resorts moved to negotiate with Johnson out of a sense that it would be easier to roll Johnson's counsel. But they are also consistent with the view that Diamond Resorts negotiated with Johnson as they did with the Smith Plaintiffs and reached settlement with Johnson first because the Smith Plaintiffs were wildly inflating their estimation of Diamond Resorts' exposure. We note these facts are also consistent with any number of other hypotheticals. At bottom, the Smith Plaintiffs' claim is speculative. Absent evidence to support their interpretation, we cannot conclude the settlement was collusive, nor can we hold the trial court erred in applying the presumption of fairness to the Johnson settlement. (*Negrete v. Allianz Life Ins. Co. of N.Am.*, *supra*, 523 F.3d at p. 1099.)

2. *Adequacy of the investigation*

The Smith Plaintiffs argue the trial court erred in concluding the settlement was adequate because Johnson didn't introduce sufficient support for finding it reasonable.[2]

"Although '[t]here is usually an initial presumption of fairness when a proposed class settlement . . . was negotiated at arm's length by counsel for the class, . . . it is clear that the court should not give rubber-stamp approval. [Fn. omitted.] Rather, to protect the

[2] The Smith Plaintiffs also argue the trial court ignored their arguments and failed to conduct any independent analysis. However, we presume the trial court performed its duties in a regular and correct manner absent a clear showing to the contrary. (*In re Amber D.* (1991) 235 Cal.App.3d 718, 755.) Accordingly, we focus on the argument that the court didn't have an adequate record to determine, in the exercise of its discretion, that the settlement was reasonable.

interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished.'" (*Kullar, supra,* 168 Cal.App.4th at p. 130, quoting 4 Newberg on Class Actions (4th ed. 2002) § 11:41 at p. 90.) "'To make this determination, the factual record before the . . . court must be sufficiently developed.'" (*Ibid*.) The trial court must have enough information before it to fulfill its fiduciary duty to determine if the settlement was fair, adequate, and reasonable. (*Kullar*, at p. 131.) Though "the court is not required to decide the ultimate merits of the class members' claims before approving a proposed settlement, an informed evaluation cannot be made without an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." (*Id.* at p. 120.)

The Smith Plaintiffs object that counsel for Johnson "provided no legal, factual, or other basis for computing" the value of the settled claims. Their characterization isn't accurate. According to declarations submitted by class counsel, they obtained a significant amount of information and data from Diamond Resorts, and counsel explained how they calculated the class members' damages based on this discovery. In May 2017, Johnson obtained formal discovery responses from Diamond Resorts, and also obtained informal discovery, which included Johnson's personal time and payroll records and a one-third sample of time and payroll records for other employees who were members of the putative class—approximately 1,000 other employees. As Johnson's counsel explained, Diamond Resorts also answered interrogatories and provided employee

handbooks, job descriptions, descriptions of bonus and commission structures, operating procedure manuals, and written policies on timekeeping, pay schemes, and meal and rest periods, pay stubs, and data on the number of workweeks and average pay rates during the period.

At the hearing on the motion for preliminary approval, the trial court objected that it couldn't tell whether the class had obtained and analyzed information and data from Diamond Resorts pertaining to the period back to August 2011, which wasn't within the class period as originally defined. Class counsel filed a supplemental declaration clarifying they had received and analyzed such data in valuing the claims. The information dating from August 2011 included "employee handbooks and relevant wage and hour policies on timekeeping, pay schemes, meal and rest periods, vacation policies, job descriptions, and job duties." They said the one-third sample of class members time and payroll records included "records for employees working in 2011 and continuing through the Class Period." They also said they had "reviewed and analyzed the compensation information relating to the Class Members dating back from 2011 through the Class Period such as . . . workweeks, average pay rates, bonus and commission structures, and other relevant information relating to the claims asserted in the complaints all during the Class Period of August 2011 through the Class Period."

On filing for final approval of the settlement, Johnson's counsel submitted a declaration explaining how they used this data to value the claims in the litigation at $11,679,614. The declaration included a detailed explanation of how they calculated

Diamond Resorts' exposure and also indicated the reasons why they had discounted the companies' exposure by settling for only about a quarter of the value they had calculated.

Johnson's counsel estimated Diamond Resorts' exposure for overtime claims at $1,302,546 based on the timekeeping and payroll records for the approximately 1,000 employee sample to come to this figure. They estimated each class member worked a half-hour of overtime per shift at an hourly overtime rate of $17.48 for approximately 148,000 shifts. They estimated exposure for missed meal break claims at $1,736,728 based on their consultant's estimate that 24 percent of all meal breaks were either short or late. They estimated exposure for rest period claims at $3,614,483 based on there being 1,949 commissioned employees who worked about 68,534 workweeks during the class period. They estimated exposure for unreimbursed expense claims as $384,927.50 based on their determination that 1,692 class members used their phones at work and their estimate that 5 percent of such employees' total phone use was work related. They valued PAGA derivative claims at $1,074,200 because such awards are in the discretion of the court and some courts have awarded only nominal awards.

Johnson's counsel explained their reasons for discounting the likely recovery of many of the claims. For example, they concluded Diamond Resorts' realistic exposure on meal break claims would be lower because Diamond Resorts had written policies and training on meal breaks that correctly stated California law and they believed Diamond Resorts would contend employees had discretion over their schedules and voluntarily waived their meal breaks, both factors which posed potential problems for class

certification and for proof of the meal break claims. They noted rest period claims are difficult to prove because there are no records and there is case law in California that could make full recovery difficult. They noted potential difficulties proving reimbursement claims because Diamond Resorts allowed employees to claim reimbursements for phone use and their claim that they had in fact reimbursed some employees. And they valued the PAGA penalties at $1,074,200 because such awards are discretionary and some courts award only nominal amounts.

Johnson's counsel also explained why they estimated some claims as having no value. They valued claims under Labor Code section 1174 at zero because the statute doesn't create a private right of action and the data Diamond Resorts had produced would make it difficult to prove they didn't keep accurate time records. They valued the unpaid vacation time claim at zero because Diamond Resorts had a recorded practice of paying vested vacation with an employee's last paycheck, and there was little evidence to support the claim. They valued the unfair competition claims at zero as duplicative of the Labor Code claims and claims for PAGA civil penalties.[3]

The total settlement amount represented about 24 percent of Diamond Resorts' realistic exposure estimate. Johnson's counsel argued the amount was fair and reasonable because of the great number of legal and factual defenses Diamond Resorts would put forward in litigation as well as potential difficulties obtaining class certification for a

[3] Counsel for appellants argued for the first time at oral argument that this rationale is invalid. We deem the argument waived. (*Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356, fn. 6.)

class of over 3,000 employees. They said going to trial would be "an expensive, complex and time-consuming process" that would require the class to "establish a significant amount of witness testimony, pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other evidence in order to evaluate and present arguments at both class certification and trial." Litigating the case would likely occupy several years and pose significant risk of failure.

3. The trial court's reasonableness determination

All of this represents precisely the kind of information the trial court needed to evaluate whether the settlement was fair and reasonable. Though the case was less than a year old when it settled, Johnson and his counsel had already obtained extensive discovery, including the employment records of over a thousand class members and the discovery obtained in the Smith Class Action. It wasn't initially clear if the data and information they'd obtained extended all the way back to 2011, but the trial court identified this issue, and Johnson's counsel clarified they had obtained the earlier information and had included it in their evaluation of the claims. Counsel also provided a detailed analysis of the claims, explaining how they had reached their estimate of Diamond Resorts' exposure. Finally, Johnson's counsel described in detail the potential factual and legal problems that could have derailed the litigation at the class certification and merits stages. These facts make the case similar to *Dunk*, *supra*, 48 Cal.App.4th at pp. 1802-1803. Following *Dunk*, we conclude that under the abuse of discretion standard

of review the record was sufficient for the trial court to make a rational and educated determination the settlement was fair, adequate and reasonable.

The Smith Plaintiffs lean heavily on *Kullar*, but the trial court record in that case was completely different. There, though the plaintiffs had added meal and rest break claims, "absolutely *no discovery* was conducted with respect to the claim that class members were not provided meal periods to which they were entitled. *No declarations were filed* in support of the settlement indicating the nature of the investigation that had been conducted to determine the number of employees that had allegedly been denied meal breaks, the frequency with which the denials had occurred, or the circumstances surrounding those denials, and *no analysis was provided* of the factual or legal issues that required resolution to determine the extent of any one-hour-pay penalties to which class members may have been entitled. *No time records* were produced in discovery nor was the court presented *any estimated quantification* of the number of one-hour-pay penalties that might be due or any explanation of the factors that were considered in discounting the potential recovery for purposes of settlement." (*Kullar, supra*, 168 Cal.App.4th at pp. 128-129, italics added.) As a result, "[t]he record fails to establish in any meaningful way what investigation counsel conducted or what information they reviewed on which they based their assessment of the strength of the class members' claims, much less does the record contain information sufficient for the court to intelligently evaluate the adequacy of the settlement." (*Id.* at p. 129.)

The facts of this case aren't in the same universe. As we've already set out in detail, Johnson's counsel provided everything that was missing in *Kullar*—they obtained discovery, including time records, they provided declarations indicating the nature of their investigations, and they spelled out the analyses of factual and legal issues that would allow the court to evaluate the strength of the claims. We therefore conclude the presumption of reasonableness applies to the Johnson settlement and *Kullar* provides no support for finding the trial court abused its discretion.

B. *Time Period of the Settlement*

The Smith Plaintiffs argue the trial court erred by allowing Johnson and Diamond Resorts to settle claims back to August 2011. They point out those claims are beyond the statute of limitations for the named plaintiffs in the Johnson case, and argue, based on *China Agritech, Inc. v. Resh, et al.* (2018) 584 U.S. __, that the Smith Class Action didn't toll the statute of limitations.

Their argument assumes parties to a class action cannot settle claims the named plaintiffs couldn't bring on an individual basis. In general, a civil statute of limitations is an affirmative defense a defendant must plead to preserve; it is not jurisdictional. (*Minton v. Cavaney* (1961) 56 Cal.2d 576, 581; *People v. Williams* (1999) 77 Cal.App.4th 436, 457-458 [civil statute of limitations applicable to medically disabled offender proceedings not jurisdictional].)

The Smith Plaintiffs have provided no authority to suggest the statute of limitations period applicable to Labor Code claims is jurisdictional. Supreme Court

authority strongly implies the contrary. In *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666-667, the Supreme Court held the time period for filing notice of appeal is not subject to equitable tolling because it is jurisdictional. In *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 107-109, the California Supreme Court concluded the Labor Code statute of limitations *was* subject to equitable tolling. It follows that Diamond Resources was free to waive its statute of limitations defense and settle claims with the named plaintiffs in the Johnson case dating back to August 2011.

C. *Adequacy of the Class Notice*

The Smith Plaintiffs argue the settlement should be invalidated because the class notice was insufficient. They argue due process "requires that notice to the class contain, in comprehensible form, the information needed to decide whether to opt out, retain counsel, or object, before judgment is entered to extinguish the class' claims."

The Smith Plaintiffs argue the notice didn't provide enough information about the settlement. "Basic due process requirements have not been satisfied because class members were not provided with essential details of the settlement and requisite information to enable an informed decision about their participation in the settlement and the impact it would have on other pending lawsuits against Defendants." Specifically, they object that the language of the notices is too narrow, in one place saying only Labor Code claims against "defendants" are released and in another saying all claims in the Johnson class action are released. They point out that the actual release is broader,

reaching claims on legal theories and against defendants who weren't involved in the Johnson class action as originally pled.

These complaints aren't well-taken. The language the Smith Plaintiffs identify as potentially misleading only summarize the release language, which is set out in full. The notice accurately describes the claims to be released as all claims "asserted in this Action or which could have been asserted in this Action related to the facts and claims asserted in this Action." The notice then lists the released claims as the nine claims asserted in Johnson's complaint as well as claims that could have been brought in the action but were not. The notice language describing the release is almost identical to the release language in the settlement. As Johnson points out, it contains only two minor changes: "First, the class notice describes the first claim as a claim 'for unpaid *wages* and overtime wages' whereas the settlement agreement describes the claim as one 'for unpaid *straight time* and overtime wages.' [Citations.] Second, the class notice gives the date of the end of the class period (July 2, 2018), while the settlement agreement lists the end of the class period as 'the date the Court grants preliminary approval . . . of the settlement.'" These small changes simplify the release language; they don't make it harder for class members to understand the claims released.

We conclude the trial court correctly determined the notice was adequate to describe the effect of the settlement to interested class members.

D. *Breadth of Release*

The Smith Plaintiffs also challenge the breadth of the settlement, though they do so under the guise of challenging the language of the notice as ambiguous. They contend "the various inconsistent articulations of the release of claims contained in the notice and settlement agreement are overbroad and ambiguous" but, having quoted the release language in full, argue instead that "[t]he *release* is not properly tailored to allegations, claims, and theories investigated, litigated, or properly valued by *Johnson* Plaintiffs or the factual allegations of the operative complaint in the *Johnson* Action." (Italics added.)

The Smith Plaintiffs provide no authority for the proposition that class action plaintiffs cannot settle, in addition to the claims they actually brought, any claims that "could have been brought" in the same action, and we are aware of none. On the contrary, "[a] general release—covering 'all claims' that were or could have been raised in the suit—is not uncommon in class action settlements." (*Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th 562, 587-588.) More, "[t]he term 'all claims' [in a release] includes 'claims that are not expressly enumerated in the release.'" (*Id.* at p. 587.) Based on these principles, the court in *Villacres* concluded a settlement agreement that released Labor Code claims also released "PAGA claims" though the complaint didn't mention PAGA and did not include a PAGA cause of action. (*Ibid.*)

These principles apply equally in this case and bar the Smith Plaintiffs' objection to the scope of the release.

E. *Trial Court's Duty to Produce Written Findings*

The Smith Plaintiffs argue the trial court erred by refusing to make specific written findings related to its determination that the class settlement was fair. They argue such findings are necessary to ensure meaningful appellate review.

As was true in the trial court, the Smith Plaintiffs provide no California authority for the principle that the trial court must issue specific findings to support a fairness determination. In their reply brief, they concede there's no California authority on point, but that "a statement of decision *should* be required for a contested motion for final approval of a class action settlement." This is so, they argue, because " a contested motion for final approval of a class action settlement is in the nature of a trial of factual issues."

In general, in California, statements of decision are required only after a trial. "In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." (Code. Civ. Proc., § 632.) When required, statements of decision must be in writing. (*Ibid.*)

"The requirement of a written statement of decision generally does not apply to an order on a motion, even if the motion involves an evidentiary hearing and even if the order is appealable." (*Lien v. Lucky United Properties Investment, Inc.* (2008) 163 Cal.App.4th 620, 623-624; see also *Gruendl v. Oewel Parntership, Inc.* (1997) 55

Cal.App.4th 654, 600.) We are reluctant to find a new exception to this general rule by requiring statements of decision for rulings on motions to approve class action settlements.

There are already specific codified procedures for the approval of class settlements. California Rules of Court, rule 3.769 requires trial court approval for class action settlements and sets out specific procedures for arriving at such approval. The rule specifies that the parties to a settlement must submit the full settlement agreement to the trial court and apply for preliminary approval. (*Id*. at (c).) The trial court must hold a hearing and may approve or deny preliminary approval. (*Id*. at (d).) If the court grants preliminary approval, its order "must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing." (*Id*. at (e).) "Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." (*Id*. at (g).) Finally, "If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment." (*Id*. at (h).) This specificity counsels against imposing a new requirement on the trial courts through judicial action.

We also think the Smith Plaintiffs overstate the need for statements of decision when approving class action settlements. "In determining whether an exception should be created," to the general rule that statements of decision are not required except for trials,

"the courts balance '"(1) the importance of the issues at stake in the proceeding, including the significance of the rights affected and the magnitude of the potential adverse effect on those rights; and (2) whether appellate review can be effectively accomplished even in the absence of express findings."'" (*In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1040.)

In *Gruendl v. Oewel Partnership, Inc., supra,* 55 Cal.App.4th at pp. 660-662, the court held a statement of decision is required following a motion to amend judgment to add a judgment debtor on an alter ego theory because the ruling would impose liability on an individual "for a substantial monetary judgment upon the trial of a case in which [the individual] was neither named nor served as a defendant" and in resolving the motion the court "necessarily 'tried' . . . issues of fact" related to the alter ego theory and noted the absence of factual findings had made review problematic. (*Id.* at p. 661.) Courts have also created an exception for proceedings involving the custody of children. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792; *In re Rose G.* (1976) 57 Cal.App.3d 406, 418). Though the approval of class settlements may implicate important financial interests, they are of lesser importance than parental interests in the custody of their children or a defendant's interest in avoiding liability to a person not previously a party to a legal dispute.

In addition, though the court considers evidentiary submissions in deciding a motion to approve class action settlements, it does not "try" issues of fact in resolving the motion. (*Kullar, supra,* 168 Cal.App.4th at p. 120 ["the court is not required to decide the

ultimate merits of the class members' claims before approving a proposed settlement"].) The trial court doesn't weigh the credibility or comparative probative strength of competing evidence, but instead should grant the motion if, given the factual and legal support provided by the proponents of the class, the settlement appears reasonable. (*Ibid.*) The nature of the trial court's inquiry explains why we review such determinations for abuse of discretion, a form of review we are able to conduct even without a statement of decision. These factors weigh heavily against creating a new exception to Code of Civil Procedure section 632, and we therefore decline to depart from the general rule that a statement of decision is not required for an order on a motion.

III

DISPOSITION

We affirm the trial court order giving final approval to the settlement and therefore affirm the judgment. Respondents are entitled to recover their costs on appeal.

NOT FOR PUBLICATION IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

McKINSTER
Acting P. J.

RAPHAEL
J.